

EDWARD F. O'HARE

MARCH 6, 1956.—Committed to the Committee of the Whole House and ordered to be printed

Mr. LANE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H. Res. 380]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 380) for the relief of Edward F. O'Hare, having considered the same, report favorably thereon without amendment and recommend that the resolution do pass.

This resolution is merely to refer H. R. 8572, a bill for the relief of Edward F. O'Hare, to the United States Court of Claims for the findings of fact and report its conclusion to the Congress. Your committee is of the opinion that it is a case that should be referred to the court and, therefore, recommend favorable consideration be given the resolution.

[H. R. 8572, 84th Cong., 2d sess.]

A BILL For the relief of Edward F. O'Hare

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, the sum of \$7,000 to Edward F. O'Hare, of Lakewood, Ohio. Such sum represents the difference in pay to which said Edward F. O'Hare was entitled under the Selective Service Act of 1940 and the Veterans' Preference Act of 1944, and the amount he was actually paid by the Railroad Retirement Board, and is the sum he would have received had he filed his petition with the United States Court of Claims prior to the running of the statute of limitations: *Provided* That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000.

WASHINGTON, D. C., February 21, 1956.

Re Edward F. O'Hare, H. R. 8572, H. Res. 380.

Hon. WALTER R. LEE,

*House Committee on the Judiciary,
House Office Building, Washington, D. C.*

DEAR SIR: The above referred to Edward F. O'Hare was inducted into the United States Army under the Selective Service Act on December 20, 1942. At that time he had permanent civil service status and held the position of unemployment claims examiner, CAF-5, at the Railroad Retirement Board in Cleveland, Ohio. He returned from military service on November 5, 1945, and was reemployed at the Board and assigned to the identical duties he was performing when he left. During his absence, his job was ungraded to a CAF-7. Under the Selective Service Act he was entitled to have the benefit of all such upgrading while he was away.

In March 1946, Mr. O'Hare was displaced from his position as unemployment claims examiner, CAF-7, and reduced in rank and compensation to the position of certifying officer, CAF-6. After the demotion became effective plaintiff still continued to perform the same duties that he had performed prior to the war as a CAF-5 and after the war as a CAF-7, but now given a different title and given a CAF-6.

Mr. O'Hare sought relief in the United States Court of Claims, which, in January 13 1953, permitted him recovery for the period July 21 to November 5, 1946, which marked the expiration of a 1-year period of protection guaranteed Mr. O'Hare as a returning veteran under the Selective Service Act. The court ruled that any denial of Mr. O'Hare's procedural rights under the Veterans' Preference Act of 1944 was barred by the statute of limitations, since it must have occurred prior to July 1, 1946. Subsequently, on July 9, 1954, Assistant Attorney General Warren E. Burger entered into a stipulation of settlement with Mr. O'Hare for the period July 1 to November 5, 1946.

The only way in which Mr. O'Hare can obtain the additional loss of pay to which he is entitled by reason of his unlawful demotion is by private bill, which should be referred to the United States Court of Claims for a decision.

With good wishes, I am

Very truly yours,

CARL L. SHIPLEY,
Attorney for Edward F. O'Hare.

IN THE UNITED STATES COURT OF CLAIMS

No. 376-52

(Decided January 13, 1953)

EDWARD F. O'HARE v. THE UNITED STATES

Mr. Carl L. Shipley for the plaintiff.

Mr. John I. Heise, Jr., with whom was *Mr. Assistant Attorney General Holmes Baldridge*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS

JONES, *Chief Judge*, delivered the opinion of the court:

Plaintiff was an employee of the Cleveland regional office of the Railroad Retirement Board, with permanent civil service status. His claim is for loss of salary resulting from an allegedly wrongful demotion in grade.

Plaintiff's petition alleges the following facts: At the time of his induction into the Army on December 20, 1942, under the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. § 301-318, and for a period of approximately a year and a half prior thereto, plaintiff had held the position of supervisor of one of the two units of claims examiners in the Cleveland regional office of the Railroad Retirement Board, grade CAF-5. The title of the position was "Unemployment Claims Examiner", although plaintiff's title had been changed to "Field Representative" on October 1, 1942, because for some reason the title "Unemployment Claims Examiner" had been omitted from a new list of positions in the Railroad Retirement Board promulgated on that day.

Plaintiff was honorably discharged from the Army and returned to work for the Board on November 5, 1945. At that time he was assigned the identical duties he had been performing prior to his induction into the Army. The position had meanwhile been upgraded to CAF-7. Plaintiff was informed by the regional director, however, that the position to which he had been assigned upon his return was not his former position, but that he had been temporarily promoted to fill the position of Mr. Stephen Wolfer, who was then in the military service. Plaintiff was informed that his own former position of Unemployment Claims Examiner, CAF-5, was no longer in existence.

On February 4, 1946, plaintiff was notified by letter from the regional director that effective March 4, 1946, he was being displaced from his position of Unemployment Claims Examiner, CAF-7, by the return of Mr. Wolfer from military service. The letter further informed plaintiff that his rights were to the position of Certifying Officer, CAF-6, in Cleveland, and that since plaintiff had indicated he preferred to remain in Cleveland his demotion would be effective March 4, 1946. The letter stated that it was a "thirty day advance notice" of displacement. It contained no statement concerning plaintiff's status or rights as a veteran.

On March 4, 1946, plaintiff was demoted to grade CAF-6 but was kept in the same position with duties unchanged. He submitted a written appeal to the Board's Director of Personnel in Chicago on March 18, 1946, but received no answer. Nor was there any reply to a follow-up letter on April 18, 1946. In response to a third letter sent on September 2, 1946, to the Secretary of the Board, he was notified that his case was being referred to the Board's Veterans Adjustment Committee; and in November 1946 he was notified that this committee was deferring action on cases of veterans in the field service until the following year.

In December 1946 plaintiff was promoted to Unemployment Claims Examiner, CAF-7, but apparently at a lower within-grade salary rate than that to which he was allegedly entitled. In August 1947 plaintiff was shown a notice stating that the Veterans Adjustment Committee had been abolished. Plaintiff next alleges that the Railroad Retirement Board rendered a final decision on June 27, 1951, denying him relief, and that on April 24, 1952, the Civil Service Commission likewise refused relief.

The gist of plaintiff's claim is apparently that as a result of the demotion in grade on March 4, 1946, he was wrongfully denied his right under the Selective Training and Service Act to employment in his former position or one of like seniority, status, and pay for a period of one year from date of restoration to duty upon his return from military service.

Plaintiff's petition was filed here on July 21, 1952. Defendant has moved to dismiss the petition on the grounds that the claim set forth therein is barred by the statute of limitations, which withholds from this court jurisdiction of claims arising more than six years prior to the filing of a petition therefor. Plaintiff contends, as in *McCormick v. United States*, C. Cls. No. 364-52, this day decided, that his claim did not arise until June 27, 1951, when the Railroad Retirement Board finally denied him relief. It is clear, however, under the authorities cited in the *McCormick* case that the statute of limitations was not tolled while plaintiff's claim was under consideration by the administrative officials. Plaintiff's contention in this respect must be rejected.

Thus plaintiff is barred by limitations from recovery for any period prior to July 21, 1946. If plaintiff's allegations are correct, however, for the reasons set forth in the *McCormick* case we do not believe the statute of limitations bars recovery for the period July 21, 1946, to November 5, 1946, which marked the expiration of the one-year period of protection guaranteed plaintiff as a returning veteran under the Selective Training and Service Act. See also *Wheeler v. United States*, C. Cls. No. 74-52, decided December 2, 1952.

The fact situation alleged in the instant case differs in one respect from that in *McCormick v. United States*, *supra*. In the latter case McCormick allegedly had never been restored to his former position upon application for reemployment, but from the beginning was given a lesser position. In the instant case, however, plaintiff was apparently duly restored to his rightful former position but several months thereafter, still within the one-year protected period under the Selective Training and Service Act, was wrongfully demoted. There is thus the additional factor that plaintiff in the instant case, who apparently was a preference eligible under the Veterans' Preference Act, 5 U. S. C. § 851 *et seq.*, may have been entitled to the procedural steps set forth in 5 U. S. C. § 863 in effecting his demotion on March 4, 1946. It does not appear to what extent, if any, plaintiff is relying

here upon denial of any procedural rights under section 863. It does appear, however, that if there was any such denial it must have occurred prior to July 21, 1946, and recovery therefor under section 863 is barred by the statute of limitations.

Defendant's motion must therefore be granted in part and denied in part. Plaintiff's claim is dismissed as to all periods prior to July 21, 1946. If by stipulation, admission of facts, or otherwise, it is established that on March 4, 1946, plaintiff was demoted in grade in violation of his rights under the Selective Training and Service Act of 1940, 50 U. S. C. App. § 308, and wrongfully denied pay to which he was entitled up to November 5, 1946, plaintiff will be entitled to recover for the period July 21, 1946, to November 5, 1946, but for no period thereafter.

The case will be referred to a commissioner of the court for such further proceedings as may be necessary.

It is so ordered.

HOWELL, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and LITTLETON, *Judge*, concur.

